

## The Impact of *Melendez-Diaz v. Massachusetts* on Admissibility of Forensic Test Results at Courts-Martial

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In June 2009, the U.S. Supreme Court decided the case of *Melendez-Diaz v. Massachusetts*.<sup>1</sup> The case is the most recent progeny of the Court's ground-breaking decision in *Crawford v. Washington*<sup>2</sup> and is proving to be, like *Crawford*, a source of both contention and uncertainty. The *Melendez-Diaz* Court held that affidavits by lab analysts stating the results of forensic tests were "testimonial" statements and thus their admission into evidence violates a defendant's right to confrontation.<sup>3</sup> As a result of this decision, military trial counsel and the forensic laboratories that support the military will likely need to adjust the way they conduct business where forensic tests, including urinalyses, are concerned.

It appears that under *Melendez-Diaz* the Government is obligated to present the live testimony of the analyst who performed a forensic test in order to introduce the results of that test. The Government may also have the option of admitting the test results through the testimony of an expert who reviewed, but did not conduct, the tests. Although this latter option was not addressed by the *Melendez-Diaz* Court, it appears to comport with the Supreme Court's Confrontation Clause jurisprudence to date. *Melendez-Diaz* also restricts the Government's options for introducing chain of custody and equipment maintenance and calibration evidence. Although the Supreme Court has left many questions unanswered with its most recent Confrontation Clause decision, one thing is certain: *Melendez-Diaz* will generate a significant amount of litigation at military courts-martial.

### I. Background

#### A. Confrontation Pre-*Crawford*

The Sixth Amendment to the U.S. Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."<sup>4</sup> As the Supreme Court has noted, the Confrontation Clause is not, and never has been, an absolute rule.<sup>5</sup> Despite the absolute language of the Sixth Amendment, courts have understood since the adoption of the Bill of Rights that the

Sixth Amendment incorporated common law hearsay exceptions to confrontation.<sup>6</sup> For example, at common law, if a witness was unavailable for trial for certain reasons and the defendant had a prior opportunity to cross-examine that witness, the witness's statement, although ordinarily considered hearsay, could nevertheless be admitted at trial without the witness's presence.<sup>7</sup>

Over time, the Confrontation Clause's "procedural . . . guarantee"<sup>8</sup> that evidence would be tested for reliability "in the crucible of cross-examination"<sup>9</sup> was partially transformed into the *substantive* guarantee that judges would determine that evidence was reliable.<sup>10</sup> The U.S. Supreme Court decision in *Ohio v. Roberts*,<sup>11</sup> issued in 1980, articulated the Confrontation Clause analysis required to admit a hearsay statement. Under *Roberts*, a court could admit a hearsay statement if, in addition to complying with hearsay rules, that statement possessed adequate indicia of reliability.<sup>12</sup> The requirement for reliability could be met by either showing that the statement fell under a "firmly rooted hearsay exception" or by showing that it possessed "particularized guarantees of trustworthiness."<sup>13</sup> Although the *Roberts* rule was consistent with the Confrontation Clause's purpose—to ensure the reliability of evidence—it was arguably inconsistent with the method prescribed by the clause for doing so.<sup>14</sup>

#### B. A Return to Constitutional Principles: *Crawford v. Washington*

In 2004, the Supreme Court significantly changed the law governing the admission of hearsay statements. In the case of *Crawford v. Washington*,<sup>15</sup> the defendant, Michael Crawford, was convicted in state court of assault for stabbing a man who Crawford's wife alleged had attempted

<sup>1</sup> 129 S. Ct. 2527 (2009).

<sup>2</sup> 541 U.S. 36 (2004).

<sup>3</sup> *Melendez-Diaz*, 129 S. Ct. at 2532.

<sup>4</sup> U.S. CONST. amend. VI.

<sup>5</sup> See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42–51 (2004).

<sup>6</sup> *Id.* at 53.

<sup>7</sup> *Id.* at 45–50.

<sup>8</sup> *Id.* at 61 (emphasis added).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 448 U.S. 56 (1980).

<sup>12</sup> *Crawford*, 541 U.S. at 66.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 541 U.S. 36 (2004).

to rape her.<sup>16</sup> Crawford's wife, Sylvia, was interviewed by police officers and made statements that undercut Crawford's self-defense claim.<sup>17</sup> The police tape-recorded Sylvia's statements.<sup>18</sup> At trial, Crawford precluded Sylvia's testimony by invoking the Washington State marital privilege.<sup>19</sup> Washington State then admitted Sylvia's tape recorded statements under the state hearsay exception for statements against penal interest.<sup>20</sup>

On appeal, Crawford argued that Washington State's use of his wife's out-of-court statement to police at trial violated his right to confront witnesses against him.<sup>21</sup> First, the Washington Court of Appeals and, then, the Washington Supreme Court examined Crawford's claim under the *Ohio v. Roberts* rubric.<sup>22</sup> Both courts agreed that Sylvia's statement did not fall under a "firmly rooted" hearsay exception, but reached opposite conclusions as to whether or not the statement "bore particularized guarantees of trustworthiness."<sup>23</sup>

The U.S. Supreme Court granted certiorari to determine whether the prosecution's use of the statements violated Crawford's Confrontation Clause rights.<sup>24</sup> In concluding that it did, the Court returned to the historical roots of the right of confrontation.<sup>25</sup> Noting that the Sixth Amendment applies to "witnesses" against the accused, the Court examined the common usage of the term "witness" at the time of the framing of the Constitution.<sup>26</sup> The Court determined that a "witness" is one who "bear[s] testimony."<sup>27</sup> The Court stated that "testimony" is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."<sup>28</sup> Based on this definition, the Court determined that hearsay statements must be categorized as either "testimonial" or "nontestimonial" when determining the applicability of the

confrontation rights.<sup>29</sup> Expressly overruling its *Roberts* decision, the *Crawford* Court ruled that testimonial hearsay statements are always subject to the confrontation.<sup>30</sup> The Court reasoned that the test in *Roberts*

departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.<sup>31</sup>

Under the *Crawford* standard, testimonial statements are admissible only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.<sup>32</sup> The next section explores the Court's answer to the question begged by the *Crawford* decision: What is "testimonial"?

### C. Defining "Testimonial" Under *Crawford*

The *Crawford* Court declined to provide a comprehensive definition of "testimonial."<sup>33</sup> The Court instead spelled out certain specific instances of testimonial statements<sup>34</sup> and three categories of testimonial statements that defined the Confrontation Clause's "coverage at various levels of abstraction."<sup>35</sup> The Court held that statements that fell within one or more of these three categories were testimonial. These categories, or "formulations," were

*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used

<sup>16</sup> *Id.* at 38.

<sup>17</sup> *Id.* at 38–41.

<sup>18</sup> *Id.* at 41.

<sup>19</sup> *Id.* at 40.

<sup>20</sup> *Id.* The Washington Court of Appeals, applying a nine-factor test, determined that Sylvia's statement did not bear particularized guarantees of trustworthiness. Among other reasons, it found that her statement did not "interlock" with the statement of her co-defendant, Michael Crawford. The Washington Supreme Court reversed, finding that Sylvia's statement so closely matched Michael's that it "interlocked" and thus bore particularized guarantees of trustworthiness.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 41–42.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 42.

<sup>25</sup> *Id.* at 43.

<sup>26</sup> *Id.* at 51.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 68.

<sup>31</sup> *Id.* at 60.

<sup>32</sup> *Id.* at 68.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (holding that testimonial statements include "police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial").

<sup>35</sup> *Id.* at 51–52.

prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.<sup>36</sup>

The lack of a comprehensive definition of “testimonial” generated a significant amount of litigation as courts struggled to classify statements under the *Crawford* standard. In 2006 the Supreme Court provided some clarification in its decision in the case of *Davis v. Washington*,<sup>37</sup> a case in which the Court examined statements made to law enforcement by an alleged assault victim both during and after an assault. The *Davis* Court held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is *to enable police assistance to meet an ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the *primary purpose* of the interrogation is *to establish or prove past events* potentially relevant to later criminal prosecution.<sup>38</sup>

The “primary purpose” test articulated in *Davis* would figure prominently in subsequent decision-making by lower courts, including the Court of Appeals for the Armed Forces (CAAF).

#### D. Application of *Crawford* and Its Progeny to the Military: *United States v. Rankin*

The seminal military case applying the Confrontation Clause post-*Crawford* is *United States v. Rankin*.<sup>39</sup> In *Rankin*, the CAAF considered whether the admission of four documents to prove a Navy Corpsman’s unauthorized absence violated the Confrontation Clause. The documents

in question included a letter from the accused’s command to the accused’s mother notifying her of her son’s unauthorized absence, a computer-generated document indicating the date the accused was accounted as being absent without authorization, a copy of a naval message noting the accused’s apprehension, and a copy of a DD Form 553 prepared for the purpose of notifying civilian law enforcement of the accused’s status as a “deserter/absentee wanted by the Armed Forces.”<sup>40</sup> The trial court admitted the documents under the business and public records exceptions to the hearsay rule.<sup>41</sup>

While Rankin’s case was pending review, the Supreme Court decided *Crawford*.<sup>42</sup> Rankin asserted on appeal that the documents admitted against him fell within the third category of core testimonial statements articulated in *Crawford*, to wit: “Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>43</sup> In deciding that all of the documents except the DD Form 553 were nontestimonial, the *Rankin* court conducted a contextual analysis using the following three questions, which the court characterized as “relevant”:

First, was the statement at issue elicited by or made in response to a law enforcement or prosecutorial inquiry? Second, did the “statement” involve more than a routine and objective cataloging of unambiguous factual matters? Finally, was the primary purpose for making, or eliciting, the statements the production of evidence with an eye toward trial?<sup>44</sup>

These three questions currently make up the analytical framework military courts use to analyze statements falling within *Crawford*’s third category of potential testimonial statements. As discussed in Part III.A, below, it seems likely this test will remain mostly intact. However, the *Melendez-Diaz* decision calls into question the utility of the *Rankin* Court’s second question: “[D]id the ‘statement’ involve more than a routine and objective cataloging of unambiguous factual matters?” This is the case despite the fact that the *Melendez-Diaz* lead opinion held that the statements in that case fell within all three of *Crawford*’s categories of potential testimonial statements and the *Rankin* analysis applies only to *Crawford*’s third category.<sup>45</sup>

<sup>36</sup> *Id.* (internal citations and quotations omitted).

<sup>37</sup> 547 U.S. 813 (2006). The *Davis* decision consolidates *Hammon v. Indiana*, 829 N.E.2d 244 (Ind. 2005), *rev’d and remanded*, 547 U.S. 813. The *Davis* court found that statements made by an assault victim to a 911 operator immediately after the assault and while the victim’s assailant was still nearby were nontestimonial. *Id.* In *Hammon*, the court held that an assault victim’s statements to a police officer who was on the scene after the police had separated the victim from her assailant were testimonial.

<sup>38</sup> *Id.* at 822 (emphasis added).

<sup>39</sup> 64 M.J. 348 (C.A.A.F. 2007).

<sup>40</sup> *Id.* at 350.

<sup>41</sup> *Id.* at 351.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52 (2004)).

<sup>44</sup> *Rankin*, 64 M.J. at 352. As discussed in Part III.A, *infra*, the *Rankin* court derived the first and third factors from Supreme Court precedent and the second factor from lower court decisions.

<sup>45</sup> See Part III.A, *infra*.

## II. The *Melendez-Diaz* Decision

### A. *Melendez-Diaz*: Facts, Procedural History, and Holding

The facts of the *Melendez-Diaz* case are as follows: Luis Melendez-Diaz was convicted in a Massachusetts court of distributing cocaine and trafficking in cocaine in an amount between fourteen and twenty-eight grams.<sup>46</sup> In November 2001, Boston police officers stopped and searched Melendez-Diaz along with two other men because the police suspected they were illegally buying and selling drugs.<sup>47</sup> The men were arrested, and during the course of the arrest, police seized four clear plastic bags containing a substance that resembled cocaine from one of the suspects, Thomas Wright.<sup>48</sup> The police put the three suspects in the back of a police cruiser and drove them to the station for booking.<sup>49</sup> During the drive to the police station, the officers noticed the suspects “fidgeting and making furtive movements in the back of the car.”<sup>50</sup> While the suspects were being booked, the officers searched the passenger compartment of the cruiser and found a plastic bag containing nineteen smaller plastic bags containing a substance resembling cocaine.<sup>51</sup>

The police sent the substance to the Massachusetts Department of Health’s State Laboratory Institute to be tested.<sup>52</sup> This laboratory was regularly used by law enforcement to analyze suspected drugs and was required by law to perform the analysis.<sup>53</sup> The lab issued three “certificates of analysis” from two state-employed forensic analysts.<sup>54</sup> The certificates contained the analysts’ conclusions that the substance in the bags weighed a certain amount and that the substance contained cocaine.<sup>55</sup> In accordance with Massachusetts law, the analysts swore to the contents of the certificates before a notary public.<sup>56</sup>

Massachusetts law specified that the certificates were “prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed.”<sup>57</sup> At Melendez-Diaz’s trial, the prosecution introduced the certificates

without testimony by the analysts who wrote the statements.<sup>58</sup> Melendez-Diaz objected to the admission of the statements as a violation of his right of confrontation, citing *Crawford*.<sup>59</sup>

The Appeals Court of Massachusetts affirmed the conviction, rejecting Melendez-Diaz’s Sixth Amendment claim under *Crawford*. In doing so, the court relied on the Massachusetts Supreme Judicial Court’s decision in *Commonwealth v. Verde*.<sup>60</sup> The *Verde* court concluded that a drug analysis certificate is “akin to a business or official record” and was thus not testimonial under *Crawford*.<sup>61</sup> After the Massachusetts Supreme Judicial Court denied review without comment, Melendez-Diaz appealed to the U.S. Supreme Court, arguing that the *Verde* holding was in conflict with the *Crawford* decision.<sup>62</sup>

Justice Scalia, writing for the majority and joined by Justices Stevens, Souter, Thomas, and Ginsberg, explained that the certificates were “testimonial” statements, and the affiants were “witnesses” for purposes of the Sixth Amendment.<sup>63</sup> Accordingly, admission of the affidavits violated Melendez-Diaz’s right to confrontation.<sup>64</sup>

### B. *Melendez-Diaz*: Analysis

The Court found that the certificates of analysis fell within all three categories of potential testimonial statements under *Crawford*—the “core class” of testimonial statements.<sup>65</sup> Noting that its description of the “core class” mentioned affidavits twice, the Court found that a “certificate of analysis” was an “affidavit” because it was a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.”<sup>66</sup>

In addition to being “affidavits,” the Court found that the certificates of analysis satisfied the third category within *Crawford*’s “core class”: “statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”<sup>67</sup> In support of this finding the Court

<sup>46</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2530–31 (2009).

<sup>47</sup> *Id.* at 2530.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Commonwealth v. Melendez-Diaz*, 2007 WL 2189152, at \*2 (Mass. App. Ct. July 31, 2007).

<sup>52</sup> *Melendez-Diaz*, 129 S. Ct. at 2530.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2531.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> 444 Mass. 279, 827 N.E.2d 701, 704 (Mass. 2005).

<sup>61</sup> *Id.*

<sup>62</sup> Brief for Petitioner at 10, *Melendez-Diaz v. Massachusetts*, 2008 WL 2468543, at \*10 (June 16, 2008) (No. 07-591).

<sup>63</sup> *Melendez-Diaz*, 129 S. Ct. at 2532.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (citing *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))).

<sup>67</sup> *Id.* (quoting *Crawford*, 541 U.S. at 52) (internal quotation marks omitted).

pointed out that, according to Massachusetts law, the “sole purpose” of the certificates was to provide “prima facie evidence” about the tested substance.<sup>68</sup> The Court surmised that the analysts who prepared the certificates must have been aware of this purpose because it was reprinted on the certificates.<sup>69</sup>

After Justice Scalia concluded what he characterized as a “rather straightforward application of our holding in *Crawford*,”<sup>70</sup> he then turned to address “a potpourri of analytic arguments”<sup>71</sup> advanced by the dissent and the Commonwealth of Massachusetts. First, the Court downplayed the dissent’s assertion that the majority opinion overturned “90 years”<sup>72</sup> of precedent governing the admission of scientific evidence.<sup>73</sup> He noted that most of the state and federal decisions relied on by the dissent were written in the last thirty years and relied on “*Ohio v. Roberts* . . . or its since-rejected theory that unopposed testimony was admissible as long as it bore indicia of reliability.”<sup>74</sup>

The Court rejected the argument that the analysts’ statements were not subject to confrontation because they were not “accusatory witnesses” in the sense that their testimony did not inculpate the defendant unless it was linked to other evidence.<sup>75</sup> The Court reasoned that the Sixth Amendment contemplated only two types of witnesses: those “against him,” as guaranteed by the Confrontation Clause, and those “in his favor,” as guaranteed by the Compulsory Process Clause.<sup>76</sup> There was, found the Court, no “third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”<sup>77</sup>

The dissent argued that the analysts were not subject to confrontation because they were not “conventional witnesses”<sup>78</sup> since (1) they reported “near-contemporaneous observations” vice “events observed in the past”;<sup>79</sup> (2) they did not observe “the crime nor any human action related to it”;<sup>80</sup> and (3) they did not give their statements “in response

to interrogation.”<sup>81</sup> Nonetheless, the Court declined to carve out an exception for these witnesses, reasoning that there was “no authority”<sup>82</sup> to do so and explaining that the exceptions would encompass evidence that is clearly testimonial.<sup>83</sup> By way of example, the Court pointed out that a police investigator who prepared a report describing a crime scene might not have observed “the crime nor any human action related to it” yet his report would clearly be testimonial evidence.<sup>84</sup>

For its part, Massachusetts argued that testimony reporting the results of “neutral, scientific testing” should be exempt from confrontation because confrontation does nothing to increase its reliability.<sup>85</sup> Acknowledging that “there are . . . in some cases better ways . . . to challenge or verify the results of a forensic test,”<sup>86</sup> the Court explained that “the Constitution guarantees one way: confrontation.”<sup>87</sup> In addition, the Court pointed out that confrontation serves to “weed out” fraudulent and incompetent analysts<sup>88</sup> and may be the only way to challenge tests that cannot be repeated (e.g., autopsies, breathalyzers, and tests of specimens that are no longer available).<sup>89</sup>

The Court also rejected the argument that the tests were admissible as business records. The Court held that they did not qualify as business or public records under the hearsay evidentiary rules because they were created by law enforcement and not for the purpose of administering a business.<sup>90</sup> The Court explained that business records are admissible without confrontation because, by their nature, they are nontestimonial—not because they fall under a hearsay exception.<sup>91</sup>

Massachusetts further argued that the Confrontation Clause was not violated because Melendez-Diaz could have subpoenaed the analysts.<sup>92</sup> The Court responded by reasoning that because the Compulsory Process Clause already guaranteed Melendez-Diaz that right, the Confrontation Clause must guarantee an additional right: to have the state bear the burden of pro-state witness “no-

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Melendez-Diaz*, 129 S. Ct. at 2533.

<sup>71</sup> *Id.* at 2532.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 2533–34.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2551 (Kennedy, J., dissenting).

<sup>79</sup> *Id.* at 2551–52 (Kennedy, J., dissenting).

<sup>80</sup> *Id.* at 2552 (Kennedy, J., dissenting).

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<sup>81</sup> *Id.* (Kennedy, J., dissenting).

<sup>82</sup> *Id.* at 2535.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2536.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2537.

<sup>89</sup> *Id.* at 2536 n.5.

<sup>90</sup> *Id.* at 2538.

<sup>91</sup> *Id.* at 2539.

<sup>92</sup> *Id.* at 2540.

shows.”<sup>93</sup> The Court further explained that the prosecution, not the defendant, has the burden to present witnesses for the state.<sup>94</sup> Finally, the Court downplayed the dissent’s prediction of the adverse consequences of the decision and restated that, even if the decision made prosecutions more difficult, the Court was bound to follow the Constitution.<sup>95</sup>

### C. Justice Thomas’s Concurrence

Justice Thomas authored a concurring opinion of some significance because of the fractured nature of the 5-4 Court. In Justice Thomas’s opinion, “the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>96</sup> Justice Thomas thus implies in his opinion that he would not join the majority in cases concerning the third category of potentially testimonial statements under *Crawford*—“statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”—unless the statements were accompanied by sufficient “indicia of formality”—for example, the statements were “Mirandized or custodial.”<sup>97</sup>

The Supreme Court has held that when, as in *Melendez-Diaz*, a Court is fragmented such that five or more justices cannot agree on a single rationale for its decision, “the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.”<sup>98</sup> Accordingly, Justice Thomas’s opinion limits *Melendez-Diaz* to “extrajudicial statements . . . contained in formalized testimonial material.”<sup>99</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2540–42.

<sup>96</sup> *Id.* at 2543 (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)).

<sup>97</sup> *Id.* (Thomas, J., concurring) (quoting *Davis v. Washington*, 547 U.S. 813, 816 (2006) (Thomas, J., concurring in part and concurring in judgment)).

<sup>98</sup> *Marks v. United States*, 430 U.S. 188, 193 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) (internal quotation marks omitted).

<sup>99</sup> *Melendez-Diaz* 129 S. Ct. at 2543 (Thomas, J., concurring) (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment)). See, e.g., *Larkin v. Yates*, 2009 WL 2049991, at \*2 (C.D. Cal. 2009) (finding “no clear majority [in *Melendez-Diaz*] if . . . the offending material did not consist of formalized testimonial material”); *People v. Rutterschmidt*, 176 Cal. App. 4th 1047, 1075 (Cal. Ct. App. 2009) (“[T]he lead opinion speaks for a court majority only on the narrow basis set forth in Justice Thomas’s concurring opinion.”); *People v. Johnson*, 2009 WL 2999142, at \*8 (Ill. App. 2009) (noting Justice Thomas’s concurrence and holding that “*Melendez-Diaz* did not reach the question of whether the analyst who conducted the scientific tests must testify at a defendant’s trial”).

Although Justice Thomas’s concurrence limits the reach of *Melendez-Diaz*, it should not be read too broadly. It seems extremely unlikely that Justice Thomas would advocate that courts could admit any forensic test result without live testimony provided the results were presented in a sufficiently informal format. Justice Thomas addressed this possibility in his dissenting opinion in *Davis*, stating, “the Confrontation Clause . . . reaches the use of technically informal statements when used to evade the formalized process.”<sup>100</sup>

### III. Comparing *Melendez-Diaz* to Military Court Precedent: Are They Consistent?

The CAAF and the service appellate courts have applied the *Crawford* line of cases to forensic test results on a number of occasions prior to the *Melendez-Diaz* decision. In separate cases the CAAF and the Army Court of Criminal Appeals (ACCA) have held that non-urinalysis forensic test results generated in furtherance of particular criminal investigations were testimonial statements.<sup>101</sup> The CAAF has also held that the results of a random urinalysis exam were nontestimonial.<sup>102</sup> Two service courts have gone a step further than the CAAF, finding that the results of urinalyses generated for a specific law enforcement purpose were also nontestimonial.<sup>103</sup> After the *Melendez-Diaz* Court’s firm repudiation of a general theory allowing admission of forensic test records as nontestimonial business records, military court decisions finding forensic test results to be nontestimonial may be vulnerable to challenge on two grounds: a misguided reliance on the neutral, scientific nature of the testing procedures and the presumption that certain forensic tests are not undertaken for a law enforcement purpose.

#### A. Non-Urinalysis Forensic Tests

In *United States v. Harcrow*,<sup>104</sup> the CAAF held that lab results of tests on physical evidence done at the behest of law enforcement are testimonial.<sup>105</sup> Lance Corporal Harcrow was convicted of drug offenses based in part on lab reports identifying substances seized from Harcrow’s house as illegal drugs.<sup>106</sup> The reports were produced by the Virginia state forensic science lab at the behest of the law

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<sup>100</sup> *Davis*, 547 U.S. at 838 (Thomas, J., dissenting).

<sup>101</sup> See *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008); *United States v. Williamson*, 65 M.J. 706 (A. Ct. Crim. App. 2007).

<sup>102</sup> See *United States v. Magyari*, 63 M.J. 123, 126–27 (C.A.A.F. 2006).

<sup>103</sup> See *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008); *United States v. Harris*, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

<sup>104</sup> 66 M.J. 154.

<sup>105</sup> *Id.* at 155.

<sup>106</sup> *Id.* at 156.

enforcement officers who seized the evidence while arresting Harcrow in his house pursuant to a warrant.<sup>107</sup> At a trial held prior to the *Crawford* decision, the Government introduced the lab reports through the testimony of the arresting police officer without defense objection.<sup>108</sup>

Applying the *Rankin* factors, the *Harcrow* court determined that these lab reports were testimonial hearsay evidence and subject to the Confrontation Clause. The CAAF analyzed the question from the perspective of the analysts testing the evidence. The *Harcrow* court explained that the lab personnel were not “merely cataloging the results of routine tests”<sup>109</sup> and could “reasonably expect their data entries would ‘bear testimony’”<sup>110</sup> because (1) the police specifically requested the tests and (2) the lab reports identified Harcrow as “the suspect.”<sup>111</sup>

In *United States v. Williamson*,<sup>112</sup> the ACCA considered a similar case. Pursuant to a controlled delivery, police arrested Sergeant Williamson and seized a package containing what was apparently marijuana.<sup>113</sup> The police sent the marijuana to the U.S. Army Criminal Investigation Laboratory (USACIL) for testing.<sup>114</sup> The USACIL generated a report stating that the substance seized was marijuana.<sup>115</sup> At trial, the judge admitted the USACIL lab report as a business record over defense objection.<sup>116</sup> Analyzing the case using the *Rankin* framework, the Army court held that the report was testimonial evidence and that the military judge’s admission of the evidence was error.<sup>117</sup> The court reasoned as follows:

[A]lthough we find generating the USACIL forensic report akin to an “objective cataloging of unambiguous factual matters[.]” i.e., the identity and amount of a controlled substance, we also find the laboratory technician’s “statements” responded to a law enforcement inquiry, and the “primary purpose for making, or eliciting, the [report]” was to produce evidence “with an

eye toward trial,” i.e., the report was produced months after appellant’s arrest, and after the government preferred the charge alleging narcotics possession with intent to distribute.<sup>118</sup>

The court made it clear that it was not drawing any bright-line rules but was instead applying the contextual analysis called for by the *Rankin* court.<sup>119</sup> The court explained that it reached its conclusion primarily because the statement in question was a “post-apprehension laboratory report, requested after local police arrested appellant.”<sup>120</sup> The Army court’s explanation left open by implication the possibility that the court might find pre-apprehension lab reports to be non-testimonial, particularly given the court’s finding that the USACIL analysts were engaging in an “objective cataloging of unambiguous factual matters” under *Rankin*.

Regarding the Army court’s “objective cataloging” finding, it is worth noting that eight months after *Williamson* was decided, the CAAF reached the opposite conclusion under very similar circumstances in *Harcrow*.<sup>121</sup> The critical facts in both cases were the same: A lab prepared a report identifying a controlled substance at the behest of the police lab post-apprehension. The fact that the courts disagreed about whether the lab workers were “bearing testimony” in their lab reports calls into question the utility of the *Rankin* court’s second question, despite the fact that both courts, applying all three *Rankin* factors, ultimately found that the statements in question were testimonial.

In addition to being difficult to apply consistently, the *Harcrow* and *Williamson* courts’ application of this second question may be inconsistent with *Melendez-Diaz* even if the ultimate conclusions reached by the *Harcrow* and *Williamson* courts are not. When developing its framework, the *Rankin* court derived its first and third questions from the Supreme Court’s decisions in *Crawford* and *Davis*.<sup>122</sup> The court derived the second question, however, from lower federal court cases addressing the testimonial nature of warrants of deportation.<sup>123</sup> The source of these questions is worth noting because the *Melendez-Diaz* Court’s refusal to differentiate between lab analysts and “conventional” witnesses indicates that the answer to the second question is irrelevant if the answer to the third *Rankin* question (“was the primary purpose . . . the production of evidence?”) is “yes.”

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* 159 (quoting *United States v. Magyari*, 63 M.J. 123, 127 (C.A.A.F. 2006) (internal quotations omitted).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> 65 M.J. 706 (A. Ct. Crim. App. 2007).

<sup>113</sup> *Id.* at 707–10.

<sup>114</sup> *Id.* at 710.

<sup>115</sup> *Id.* at 710–11.

<sup>116</sup> *Id.* at 707.

<sup>117</sup> *Id.*

<sup>118</sup> *United States v. Williamson*, 65 M.J. 706, 718 (A. Ct. Crim. App. 2007) (quoting *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)).

<sup>119</sup> *Id.* at 717.

<sup>120</sup> *Id.* at 717–18.

<sup>121</sup> *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F.).

<sup>122</sup> *Rankin*, 64 M.J. at 351–52.

<sup>123</sup> *Id.* at 352.

The *Melendez-Diaz* Court held that the certificates of analysis at issue in that case were “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” (the third category of potential testimonial evidence addressed by the *Rankin* test) because their purpose was to provide evidence at a trial.<sup>124</sup> The Court also rejected outright the notion that laboratory analysts are different than “conventional” witnesses because they objectively record results of tests performed in accordance with standard routines.<sup>125</sup> It seems apparent that if the Government’s purpose for obtaining a test result is to produce or preserve evidence for trial, it does not make any difference how “objective” or “routine” the laboratory process is, or how “unambiguous” or “factual” the matters being recorded are. In other words, if the police send evidence to a lab pursuant to a criminal investigation, *Melendez-Diaz* seems to hold that any lab reports generated will be testimonial whether or not a suspect has been apprehended or even identified.

## B. Urinalysis Reports

If *Melendez-Diaz* does indeed mean that the results of tests of evidence sent to a lab pursuant to a criminal investigation are necessarily testimonial, the decision may disturb military precedent regarding urinalysis tests. It is likely that two decisions—*Blazier*<sup>126</sup> and *Harris*<sup>127</sup>—will no longer be good law because both found the reports of urinalysis test results, based on individualized suspicion, to be nontestimonial by focusing on the nature of the testing procedure (the second question in *Rankin*). There is also a good case to be made that, in light of *Melendez-Diaz*, even reports containing the results of random urinalyses are testimonial.

### 1. Random Urinalysis

In *United States v. Magyari*,<sup>128</sup> the CAAF held that lab reports from random urinalyses were not “statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial by the government” and were

thus nontestimonial under *Crawford*.<sup>129</sup> The court reasoned that the lab technicians testing random samples had no reason to suspect any particular individual’s sample would test positive and be used at a criminal trial. The court further reasoned that the lab technicians’ data entries were not part of a law enforcement function but instead were “simply a routine, objective cataloging of an unambiguous factual matter.”<sup>130</sup> The *Magyari* court approvingly cited the Massachusetts Supreme Judicial Court’s decision in *Commonwealth v. Verde*<sup>131</sup> for the proposition that “drug tests are nontestimonial if they are ‘mere[] records of primary fact, with no judgment or discretion on the part of the analysts.’” The *Verde* court’s reasoning was also relied on by the Appeals Court of Massachusetts when it held that the certificates of analysis introduced against Luis Melendez-Diaz were nontestimonial.<sup>132</sup>

That the Supreme Court rejected the *Verde* court’s reasoning suggests that *Magyari* is no longer valid precedent to the extent the decision relies on an analyst’s detachment from the exercise of judgment or discretion for its holding. However, the *Magyari* court also reasoned that the lab technicians were “not engaged in a law enforcement function” when they tested Magyari’s urine sample.<sup>133</sup> Implicit in the court’s decision was a finding that the Navy Drug Screening Laboratory was an “impartial examining center”<sup>134</sup> and that the report it produced was “a record of ‘regularly conducted’ activity.”<sup>135</sup> The court stopped short of concluding that all records prepared by the lab were nontestimonial. In dicta, the court explained that lab records may be testimonial “where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence.”<sup>136</sup> The *Magyari* court’s narrowing of its decision in this way anticipated the facts in *Melendez-Diaz* and allows the two cases to be distinguished on the basis of the Government’s purpose for obtaining the test results. Of course, distinguishing the two cases on this basis is possible only if the *Magyari* court was correct in its assessment that the report of the urinalysis was not created for purpose of producing evidence for trial. This assessment is debatable in two respects.

<sup>124</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

<sup>125</sup> *Id.* at 2535–38 (rejecting dissent’s argument that analysts should be treated differently than other witnesses because an analyst “reports . . . observations at the time they are made[,] . . . does not know the defendant’s identity, much less have personal knowledge of an aspect of the defendant’s guilt[,] . . . [and conducts tests] according to scientific protocols.” *Id.* at 2551–52 (Kennedy, J., dissenting))

<sup>126</sup> *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008).

<sup>127</sup> *United States v. Harris*, 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

<sup>128</sup> 63 M.J. 123 (C.A.A.F. 2006).

<sup>129</sup> *United States v. Magyari*, 63 M.J. 123, 126–27 (C.A.A.F. 2006).

<sup>130</sup> *Id.* at 126 (citing *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005) (internal quotations omitted)).

<sup>131</sup> 444 Mass. 279 (Mass. 2005).

<sup>132</sup> *Commonwealth v. Melendez-Diaz*, 2007 WL 2189152, at \*4 n.3 (Mass. App. Ct.) (July 31, 2007).

<sup>133</sup> *Magyari*, 63 M.J. at 126.

<sup>134</sup> *Id.* at 127.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

First, one could challenge the court's *ipse dixit* that the Navy lab was an "impartial examining center" or that it was performing an impartial function when it tested urine from random urinalysis tests. The fact that military labs prepare "litigation packets" specifically for the purpose of prosecuting drug cases belies the assertion that the labs are not conducting urinalyses to produce evidence for trial.<sup>137</sup> Indeed, it is Department of Defense (DoD) policy to use drug testing "to deter Military Service members . . . from abusing drugs" and "as a basis to take action, adverse or otherwise . . . , against a Service member based on a positive test result," and to use urinalysis results "as evidence in disciplinary actions under the UCMJ."<sup>138</sup> The counter-argument is that although producing evidence may be one purpose of the labs, their primary purpose is "to permit commanders to detect drug abuse and assess the security, military fitness, readiness, good order, and discipline of their commands."<sup>139</sup>

A stronger argument could be made that, even if the overall purpose of random urinalysis tests is not to produce or preserve evidence for trial, any reports produced by the lab analysts who perform the final tests confirming the presence of controlled substances must be testimonial. For instance, the Army drug testing laboratory at Fort Meade conducts immunoassay screening tests of all of the urine samples it receives.<sup>140</sup> However, only those samples that test positive at the two screening tests are sent to a different part of the lab to be tested using a gas chromatography-mass spectrometry (GC-MS) test, also known as the "confirming" test.<sup>141</sup> Accordingly, the lab technicians administering the GC-MS test must know that there is a high probability that the samples they are testing come from servicemembers that have used illegal drugs. These technicians also know that the military uses GC-MS test results to prosecute Soldiers; therefore, the primary purpose of, at a minimum, the GC-MS "confirming" test is to produce evidence for trial.

On the other hand, one could argue that this is not the primary purpose because some Soldiers whose urine tests positive are not court-martialed. This argument seems unconvincing because the protocols in place at military drug testing labs are designed such that the test results can

arguably provide evidence of guilt beyond a reasonable doubt at a court-martial—a testing standard that would not be necessary if the purpose of a GC-MS test was simply to support adverse administrative action or enrollment in a substance abuse program.<sup>142</sup> In any event, it seems that an objective GC-MS lab technician would reasonably believe that his statement would be available for use at a later trial by the Government, and the test result would thus be testimonial (and not admissible as a public or business record)<sup>143</sup> under *Crawford*.

Although two of the service courts have found, in unpublished opinions, that *Melendez-Diaz* did not overrule *Magyari*,<sup>144</sup> the *Magyari* court's view that lab results of random urinalyses are admissible as nontestimonial business records no longer seems tenable. The *Magyari* court's rationale—that the lab tests are "simply a routine, objective cataloging of an unambiguous factual matter"<sup>145</sup>—has been undermined by *Melendez-Diaz*.<sup>146</sup> The *Magyari* court's assessment of the purpose of random urinalyses, although not specifically addressed by *Melendez-Diaz*, seems insufficiently convincing to serve as the sole rationale for the court's holding.

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<sup>142</sup> Not every service requires proof of misconduct beyond a reasonable doubt to punish a service member under Article 15, Uniform Code of Military Justice (UCMJ) as the Army does. For those services that do not, at least, it cannot be argued that the rigorous protocols followed by military drug testing labs are followed for the purpose of producing evidence at non-judicial punishment hearings. In addition, the fact that a Soldier facing non-judicial punishment proceedings may elect to refuse those proceedings and demand his right to be tried at a court-martial means that even the Army lab must contemplate that any GC-MS test result may be introduced at a court-martial.

<sup>143</sup> See *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539–40 (2009) (explaining that statements are not *per se* nontestimonial because they are business records, but rather, business records are nontestimonial because they are "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial").

<sup>144</sup> See *United States v. Robinson*, 2010 WL 317686 (N-M. Ct. Crim. App. Jan. 28, 2010) (unpublished) (holding that the unchallenged admission of a lab report showing the accused's urine sample gathered as part of a unit sweep was positive for cocaine was not plain error); *United States v. Bradford*, 2009 WL 4250093 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding that an Article 62 appeal of a random urinalysis case that the judge committed error by preventing the admission of a redacted lab report on the basis that documents containing information about post-initial screening tests are testimonial); *United States v. Anderson*, 2009 WL 4250095 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding that an Article 62 appeal that judge's denial of Government request to pre-admit lab report of a consent urinalysis testing positive for morphine was error where Government planned to present expert testimony from a lab employee).

<sup>145</sup> 63 M.J. 123, 126 (C.A.A.F. 2006).

<sup>146</sup> Although as discussed in Part II.C, *supra*, Justice Thomas's concurrence arguably limits *Melendez-Diaz* to cases involving sworn affidavits (which are not present in urinalysis litigation packets), it seems unlikely that a lab could escape Confrontation Clause scrutiny by simply having its analysts cease swearing to their certified lab test results.

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<sup>137</sup> See, e.g., Laboratory Documentation Packet from the Forensic Toxicology Drug Testing Laboratory at Fort Meade, Md. (8 May 2009) [hereinafter Laboratory Documentation Packet] (on file with author).

<sup>138</sup> U.S. DEP'T OF DEF., DIR. 1010.1, MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM paras. 3.1.1, 3.1.3, 3.4.1 (9 Dec. 1994) (C1, 11 Jan. 1999) [hereinafter DoDD 1010.1].

<sup>139</sup> *Id.* para. 3.1.2.

<sup>140</sup> Laboratory Documentation Packet, *supra* note 137.

<sup>141</sup> *Id.*

## 2. Urinalysis Reports Based on Individualized Suspicion

*United States v. Harris*<sup>147</sup> is a Navy-Marine Corps Court of Criminal Appeals (NMCCA) case that considered whether a lab report generated following a command-directed urinalysis was testimonial. In *Harris*, the accused was arrested for trespassing and, due to his bizarre behavior, was ordered to undergo a urinalysis by his command.<sup>148</sup> Law enforcement sent the sample to the Navy drug testing laboratory, which tested the sample and returned a report indicating that the accused's urine tested positive for illegal drugs.<sup>149</sup> The report was admitted against the accused at trial. The *Harris* court held that the lab report was nontestimonial and that its admission did not violate the Confrontation Clause.<sup>150</sup> In reaching its result, the court relied on the CAAF's holding in *Magyari*.<sup>151</sup> The *Harris* court reasoned that, although the CAAF opinion in *Magyari* was limited to cases of random urinalysis, the report from the command-directed urinalysis was, nevertheless, nontestimonial because the lab would have followed the same procedures regardless of the reason it received the urine sample.<sup>152</sup> The court noted that the lab's processes precluded lab technicians from knowing whether a particular sample was being tested to produce evidence for trial or not.<sup>153</sup>

After the case was remanded by CAAF on other grounds,<sup>154</sup> the NMCCA re-examined *Harris*' Sixth Amendment claim of error.<sup>155</sup> Applying the *Rankin* factors, the court again concluded that the report was nontestimonial. The court reasoned that the report was not "elicited by or made in response to a law enforcement or prosecutorial inquiry"<sup>156</sup> because it was "less than certain" that neither *Harris*'s command nor the lab officials had *Harris*'s prosecution in mind when they elicited and made the report.<sup>157</sup> In applying the "primary purpose" factor, the court examined the question solely from the perspective of the lab technicians and concluded that their primary purpose "was the proper implementation of the Navy Lab's drug

screening program, not the production of evidence . . . for use at trial."<sup>158</sup>

The *Harris* court's logic seems inconsistent with Supreme Court precedence in two ways. First, the *Harris* court's "less than certain" standard does not comport with the standard articulated in *Crawford* and *Melendez-Diaz*. The question the *Rankin* factors seek to resolve is whether a statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be *available for use* at a later trial."<sup>159</sup> The question is not, as the *Harris* court suggests, whether a statement would *actually be used* at a later trial. It seems a stretch to assert that lab officials and *Harris*'s chain of command would not have believed that test results of a urine sample collected based on probable cause, sent individually to the lab, and labeled "probable cause"<sup>160</sup> would not have been available for use at a later trial.

Second, the *Harris* court's determination of the "primary purpose" of the lab technicians who made the report is too narrowly focused. The relevant "purpose" is the DoD's stated purpose for drug screening: to deter servicemembers from abusing drugs, to permit commanders to assess the state of their commands, and to take action (adverse or otherwise) against servicemembers who use drugs.<sup>161</sup> One way the DoD accomplishes these objectives is through the use of urinalysis results "as evidence in disciplinary actions under the UCMJ."<sup>162</sup> "Properly implementing the Navy Lab's drug screening program" is simply a description of a lab technician's job and a means by which the lab technician achieves the overall purpose of the DoD drug screening program. The *Harris* court's rationale—that the purpose of a lab technician properly performing his job is to properly perform his job—seems circular and nonsensical.

After *Magyari* and *Harris* were decided, the Air Force Court of Criminal Appeals (AFCCA) decided *United States v. Blazier*,<sup>163</sup> a case that involved two forensic laboratory reports on the same defendant. Senior Airman Blazier was convicted of drug use in 2006.<sup>164</sup> Over the objection of the defense, the prosecution offered at trial the results of two urinalysis lab reports without the testimony of the lab technicians who prepared the reports.<sup>165</sup> The first report,

<sup>147</sup> 65 M.J. 594 (N-M. Ct. Crim. App. 2007).

<sup>148</sup> *United States v. Harris*, 65 M.J. 594, 596 (N-M. Ct. Crim. App. 2007).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 600.

<sup>151</sup> *Id.* at 599–600.

<sup>152</sup> *Id.* at 600.

<sup>153</sup> *Id.*

<sup>154</sup> *United States v. Harris*, No. 07-0385 (C.A.A.F. Dec. 31, 2007).

<sup>155</sup> *United States v. Harris*, 66 M.J. 781 (N-M. Ct. Crim. App. 2008).

<sup>156</sup> *Id.* at 788 (citing *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 789.

<sup>159</sup> *Rankin*, 64 M.J. at 351 (quoting *Crawford v. Washington*, 541 U.S. 36, 51–52) (2004) (emphasis added).

<sup>160</sup> *United States v. Harris*, 66 M.J. 781, 788 (N-M. Ct. Crim. App. 2008).

<sup>161</sup> DoDD 1010.1, *supra* note 138, paras. 3.1.1–.3.

<sup>162</sup> *Id.* para. 3.4.1.

<sup>163</sup> 68 M.J. 544 (A.F. Ct. Crim. App. 2008).

<sup>164</sup> *United States v. Blazier*, 68 M.J. 544, 544 (A.F. Ct. Crim. App. 2008).

<sup>165</sup> *Id.*

which indicated that Blazier had used drugs, contained test results of a urine sample taken as part of a random urinalysis.<sup>166</sup> Five days after the initial urinalysis, Blazier consented to another urinalysis at the request of law enforcement officials.<sup>167</sup> The report generated from the consent urinalysis also indicated that Blazier had used drugs.<sup>168</sup>

In a 2-1 ruling the *Blazier* court determined that the trial judge's admission of both reports as nontestimonial and falling within the business records hearsay exception was not an abuse of discretion.<sup>169</sup> The court reasoned that the testing procedures in both urinalyses were identical and that, looking objectively at the totality of the circumstances, the lab technicians had conducted a neutral function: "[the] routine and objective cataloging of unambiguous factual matters."<sup>170</sup> In reaching its decision, the *Blazier* court relied on the *Magyari* court's holding that the lab report of a urinalysis following testing procedures identical to those at issue in *Blazier* was nontestimonial.<sup>171</sup>

Judge Jackson dissented on the issue of the nature of the report generated from Blazier's consent urinalysis. Judge Jackson's view was that with regard to the testimonial nature of the report, the neutral nature of the lab technicians, although relevant, should not have been the court's "sole consideration."<sup>172</sup> Rather, it was the Government's purpose in conducting the consent urinalysis that was dispositive.<sup>173</sup> Judge Jackson reasoned that the second report was testimonial because the Government sought the consent urinalysis for the purpose of gathering evidence to use against Blazier at a criminal trial.<sup>174</sup>

Although the Air Force court maintained in a recent unpublished decision that *Blazier* and *Harris* are still good law,<sup>175</sup> the *Melendez-Diaz* decision casts serious doubt on the precedential value of these two cases. The logic behind *Melendez-Diaz* Court's rejection of the notion that lab analysts are not "conventional" witnesses also undermines the *Blazier* and *Harris* courts' rationale finding urinalysis

reports to be testimonial because of the way the tests were conducted. What remains is the fact that the Government sent urine samples to the drug testing laboratories for the purpose of producing evidence against a specific criminal suspect. Under *Melendez-Diaz*, forensic lab reports prepared for this purpose are testimonial. The fact that the CAAF recently granted review of *Blazier*<sup>176</sup> in light of *Melendez-Diaz* suggests that the CAAF may be concerned that *Blazier* was wrongly decided.<sup>177</sup>

#### IV. The Way Ahead

If *Melendez-Diaz* does significantly affect military precedent, military justice practitioners will obviously need to adjust to the changed legal landscape. This section seeks to predict the way ahead for military practitioners after *Melendez-Diaz*. In doing so, it will explore the following questions: First, who are "analysts" under *Melendez-Diaz*? Second, who, other than analysts, can testify about a forensic test's results? Third, can the lab report be admitted without accompanying testimony by the analyst who prepared it? Finally, what is the effect of *Melendez-Diaz* on chain of custody and equipment maintenance evidence?

##### A. Who Are "Analysts" Under *Melendez-Diaz*?

The *Melendez-Diaz* Court's requirement for the analyst to testify in order to admit the analyst's conclusions begs the question: Who is the analyst? Taking up this question, the *Melendez-Diaz* dissent argued that the majority failed to

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 544.

<sup>169</sup> *Id.* at 545-46.

<sup>170</sup> *Id.* at 545 (citing *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008)).

<sup>171</sup> *Id.* at 545.

<sup>172</sup> *Id.* at 546 (Jackson, J., dissenting).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See *United States v. Skrede*, 2009 WL 4250031 (A.F. Ct. Crim. App. Nov. 23, 2009) (unpublished) (holding on an Article 62 appeal that lab reports based on urine specimens provided pursuant to random and consent urinalyses were nontestimonial statements).

<sup>176</sup> *United States v. Blazier*, \_\_ M.J. \_\_, No. 09-0441/AF (C.A.A.F. Oct. 29, 2009) (granting review of the following issue: Whether, in light of *Crawford v. Washington*, 541 U.S. 36 (2004), appellant was denied meaningful cross-examination of Government witnesses in violation of his Sixth Amendment right of confrontation when the military judge did not compel the Government to produce essential Brooks Law officials who handled Appellant's urine samples and instead allowed the expert toxicologist to testify to non-admissible hearsay). See *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_, 129 S. Ct. 2527 (2009)). See also *United States v. Garcia-Varela*, \_\_ M.J. \_\_, No. 09-0660/AF (C.A.A.F. Oct. 29, 2009) (granting review of the following issues: (1) Whether, in light of *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_, 129 S. Ct. 2527 (2009), appellant was denied his Sixth Amendment right to confront the witnesses against him where the Government's case consisted of appellant's positive urinalysis; and (2) Whether trial defense counsel's statement that he did not object to the admission of the drug laboratory report at trial waived or forfeited the Confrontation Clause issue, and, if forfeited, whether admission of the report constituted plain error.).

<sup>177</sup> The CAAF may find a way to preserve the result in *Blazier* using rationale different than that employed by the Air Force court. Neither the majority nor the dissent in the lower court decision mentioned that an expert from the lab testified for the Government at trial. Nonetheless, the CAAF spent some time discussing this expert's testimony during oral arguments. See Audio Recording, Oral Arguments, Jan. 26, 2010, *United States v. Blazier*, (C.A.A.F. Oct. 29, 2009) (No. 09-0441/AF), available at <http://www.armfor.uscourts.gov/CourtAudio2/20100126a.wma>. Depending on the nature of the expert's testimony, the CAAF may find that the Confrontation Clause was satisfied because the defense was free to cross-examine the expert. See Part IV.C, *infra*.

explain which people involved in a typical forensic test were “analysts.”<sup>178</sup> The dissent gave an example involving four possible individuals: The first prepares a drug sample for a testing machine and retrieves the machine’s printout. The second interprets the printout. The third maintains the machine. The fourth supervises the process to ensure the others follow established procedures.<sup>179</sup> The dissent argued that each of these people contributes to the test’s results, makes a representation about the test, and may be responsible for negligently or intentionally introducing error in the test.<sup>180</sup> Under the majority’s logic, the dissent argued, all four of these individuals must testify in order to satisfy the Confrontation Clause.<sup>181</sup> In light of the dissent’s concern over the need to call four witnesses, it is interesting to note that the urine sample at issue in *Magyari* was handled or tested by approximately *twenty* people.<sup>182</sup>

One response to the “who is the analyst” question eliminates certain witnesses based on their technical role in the testing process. The Government is not required to produce witnesses “establishing the chain of custody, authenticity of the sample, or accuracy of the testing device”<sup>183</sup> because, as the *Melendez-Diaz* majority stated in a footnote (“footnote 1”), those individuals are not necessarily required to “appear in person as part of the prosecution’s case.”<sup>184</sup> The problem with this answer is that, as the dissent points out, it fails to explain why these individuals are different than “analysts.” Referring to footnote 1, the *Melendez-Diaz* dissent stated, “It is no answer.”<sup>185</sup> Nevertheless, it appears the *Melendez-Diaz* majority has drawn a line in this case, apparently finding that defendants can adequately challenge these foundational facts through cross-examination of the Government’s analyst. For instance, the defense could cross-examine an analyst on whether a sample arrived at her station unadulterated, whether the lab’s equipment was functioning properly, and so on. Several courts have found the *Melendez-Diaz* majority’s answer in footnote 1 to be sufficient.<sup>186</sup>

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<sup>178</sup> *Melendez-Diaz*, 129 S. Ct. at 2544 (Kennedy, J., dissenting).

<sup>179</sup> *Id.* (Kennedy, J., dissenting).

<sup>180</sup> *Id.* at 2545 (Kennedy, J., dissenting).

<sup>181</sup> *Id.* at 2546 (Kennedy, J., dissenting).

<sup>182</sup> *United States v. Magyari*, 63 M.J. 123, 124 (C.A.A.F. 2006).

<sup>183</sup> *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 2546 (Kennedy, J. dissenting).

<sup>186</sup> *See, e.g.*, *United States v. Forstell*, 2009 WL 2634666 (E.D. Va) (holding that Intoxilyzer breath alcohol measuring device maintenance and calibration certificates signed by the police technician who maintained the Intoxilyzer “fit squarely into the category of nontestimonial records carved out by the Supreme Court”); *People v. Johnson*, 2009 WL 2999142, at \*8 (Ill. Ct App. 2009) (citing footnote 1 of *Melendez-Diaz* for the proposition that “it is up to the prosecution to decide which steps to introduce into evidence at trial”); *United States v. Darden*, 656 F. Supp. 2d 560 ((D. Md. 2009) (citing footnote 1 for the holding that *Melendez-Diaz* does not require the live testimony of lab technicians who performed a forensic blood

The problem becomes thornier when one considers lab technicians whose duties blur the line between the duties identified in footnote 1 (e.g., chain of custody) and the duties of the archetypal beaker-wielding analyst. Consider, for example, a lab technician handling a urinalysis sample at the Army’s Fort Meade Forensic Toxicology Drug Testing Laboratory. A typical “Laboratory Documentation Packet” prepared by that lab includes a memorandum for record describing the lab’s urine testing procedures.<sup>187</sup> The three-page memorandum describes the actions of various technicians in the “intra-laboratory chain of custody”:

The technician labels a new test tube with a LAN [laboratory accession number] label, and then opens the bottle and pours a one to two milliliter (mL) aliquot into the corresponding barcode labeled test tube. The technician closes the bottle and places the bottle into a tray for temporary storage. The technician returns the specimen bottles to temporary storage. The laboratory documents all movement and handling of the specimen bottle on the DD Form 2624 and a continuation intra-laboratory form.<sup>188</sup>

It seems apparent that the DD Form 2624 referenced in the lab memorandum is simply shorthand for a series of statements by various technicians: “I labeled a new test tube with a LAN label;” “I opened the bottle and poured a one to two milliliter aliquot into the corresponding barcode labeled test tube;” etc. One could argue that “intra-laboratory chain of custody” technicians perform analytic functions as significant as the lab worker who performs the final steps of the analytic process. As in the example highlighted by the *Melendez-Diaz* dissent, each technician contributes to the result of the test, makes certain representations about the test, and has the power to introduce error into the test.<sup>189</sup> The question becomes one of line-drawing: Is the Fort Meade “intra-laboratory chain of custody” technician a chain of custody witness like a Fed-Ex delivery person, or is he an “analyst” like the people who signed the affidavits in *Melendez-Diaz*?

Unfortunately, the *Melendez-Diaz* decision does not provide the answer. Because analysis implies some level of skillful judgment, analysts could be distinguished from technicians who perform rote tasks, such as labeling test tubes, from those exercising intellectual expertise and discretion. Although *Melendez-Diaz* does not explicitly allow for that line-drawing, it is consistent with the Court’s

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analysis when a supervising toxicologist testifies about the results of the analysis after reviewing the raw data and forming his own conclusions).

<sup>187</sup> Laboratory Documentation Packet, *supra* note 137.

<sup>188</sup> *Id.*

<sup>189</sup> *Melendez-Diaz*, 129 S.Ct. at 2545 (Kennedy, J., dissenting).

characterization of an analyst as an “expert witness[] . . . [whose] lack of proper training or deficiency in judgment may be disclosed in cross-examination.”<sup>190</sup> In any event, unless the Supreme Court permits some additional line-drawing, it would appear that the military must either streamline its testing procedures to significantly reduce the number of people who could be classified as “analysts” or provide greater incentives for defendants to waive their confrontation rights.<sup>191</sup>

#### B. Who Other Than the Analyst Can Testify About a Forensic Test’s Results?

Fortunately for the Government, there may be a “middle way.”<sup>192</sup> The practice of having an expert (1) review the process and the results of tests performed by other people; and (2) testify as to the independent conclusions the expert drew based on his review has been upheld by a number of courts post-*Melendez-Diaz*. In addition, after deciding *Melendez-Diaz*, the Supreme Court has denied certiorari of lower court decisions where this practice was employed.

Four days after deciding *Melendez-Diaz*, the Court vacated and remanded for further reconsideration a number of cases involving Confrontation Clause challenges to the admission of forensic evidence in light of *Melendez-Diaz*, including: *People v. Barba*,<sup>193</sup> *Ohio v. Crager*,<sup>194</sup> *Commonwealth v. Rivera*,<sup>195</sup> *Commonwealth v. Morales*,<sup>196</sup> and *Commonwealth v. Pimentel*.<sup>197</sup> The Supreme Court did not vacate the Fourth Circuit’s decision in *United States v.*

*Washington*<sup>198</sup> or the California Supreme Court’s decision in *People v. Geier*<sup>199</sup> even though those courts found, as in the vacated cases, that evidence of forensic tests were nontestimonial. Accordingly, what distinguishes those cases from the other four may provide some clues about the limits of the *Melendez-Diaz* decision. The distinguishing characteristic in *Washington* and *Geier* appears to be the use of expert testimony to admit evidence about the results of forensic tests.

In *Washington*, a U.S. Park police officer stopped Dwonne Washington’s car after observing Washington driving erratically on the Baltimore-Washington parkway, which falls within the Federal Government’s territorial jurisdiction.<sup>200</sup> On the night of his arrest, Washington consented to a police request for a blood sample, which the police sent to the Armed Forces Institute of Pathology Forensic Toxicology Laboratory for testing.<sup>201</sup> Three lab technicians performed various tests using the lab’s machines and provided the raw data in the form of computer printouts to the lab’s chief toxicologist.<sup>202</sup> The toxicologist prepared a report and provided it to the police.<sup>203</sup> Based on his report, the Government charged Washington with driving under the influence of alcohol or PCP, among other charges.<sup>204</sup>

The toxicologist testified at Washington’s trial about the test results and the physiological effects of alcohol and PCP.<sup>205</sup> The trial court admitted his testimony as an expert witness under Federal Rules of Evidence 702 and 703.<sup>206</sup> The Defense objected to his testimony, arguing that it violated Washington’s confrontation rights because the toxicologist did not personally perform the tests.<sup>207</sup> The Defense argued that the Confrontation Clause entitled Washington to confront the lab technicians who prepared the samples for the testing machines.<sup>208</sup> On appeal, Washington argued that the computer printouts were testimonial statements of the lab technicians.<sup>209</sup>

<sup>190</sup> *Id.* at 2537 (emphasis added).

<sup>191</sup> The appointment of Justice Sonia Sotomayor in 2009 to replace the retiring Justice David Souter may have some impact on future line-drawing. As Justice Souter was part of the *Melendez-Diaz* 5-4 majority, Justice Sotomayor has now become a “swing vote.” Given the dissent’s strongly worded opinion, it is likely that the dissenting justices will seek to narrow the reach of *Melendez-Diaz* if Justice Sotomayor agrees with their interpretation of the law. Thus far, it appears that Justice Sotomayor is siding with the majority. Following her appointment, the Court granted certiorari of a case that seemed to be directly at odds with the *Melendez-Diaz* decision. The fact that the Court returned a per curiam decision that upheld *Melendez-Diaz* indicates that the dissent failed to gather an additional vote. See *Briscoe v. Virginia*, \_\_\_ S. Ct. \_\_\_, 2010 WL 246152 (Va. 2010).

<sup>192</sup> A “middle way” is “a mediating path or compromise between extremes of action or policy.” Dictionary.com, Define Middle Way, [http://dictionary.reference.com/browse/middle way](http://dictionary.reference.com/browse/middle+way) (last visited Nov. 16, 2009).

<sup>193</sup> 2007 WL 4125230 (Cal. App. 2d Dist.), *vacated*, 129 S. Ct. 2857 (2009).

<sup>194</sup> 116 Ohio St. 3d 369 (Ohio 2007), *vacated*, 129 S. Ct. 2856 (2009).

<sup>195</sup> 70 Mass.App.Ct. 1116 (Mass. App. Ct. 2007), *vacated*, 129 S. Ct. 2857 (2009).

<sup>196</sup> 71 Mass. App. Ct. 587 (Mass. App. Ct. 2008), *vacated*, 129 S. Ct. 2858 (2009).

<sup>197</sup> 2008 WL 108762 (Mass.App.Ct. 2008), *vacated*, 129 S. Ct. 2857 (2009).

<sup>198</sup> 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (U.S. June 29, 2009) (No. 07-8291).

<sup>199</sup> 41 Cal. 4th 555 (2007), *cert. denied*, 129 S. Ct. 2856 (U.S. June 29, 2009) (No. 07-7770).

<sup>200</sup> *United States v. Washington*, 498 F. 3d 225, 227–28 (4th Cir. 2007).

<sup>201</sup> *Id.* at 228.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 228–29.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

The Fourth Circuit rejected Washington's argument, holding that the printouts of the raw data were not the statements of the lab technicians.<sup>210</sup> The court reasoned that the data was produced by a machine and that the "technicians could neither have affirmed or denied *independently* that the blood contained PCP and alcohol because all the technicians could do was to refer to the raw data printed out by the machine."<sup>211</sup> The court further held that the machines were not "declarants" and the machine-produced raw data were not hearsay "statements" as implicated by the Confrontation Clause.<sup>212</sup> The court reasoned that "[o]nly a *person* may be a declarant and make a statement."<sup>213</sup>

*Washington* can be distinguished from the vacated cases in at least two ways. First, the *Washington* court did not rely on the *Verde* line of reasoning, which the *Melendez-Diaz* Court had rejected. Second, the testifying toxicologist had not merely repeated the statements of out-of-court declarants. Rather, the toxicologist had interpreted data supplied by other people and by machines and had testified about his own independent conclusions.

On the same day the Supreme Court denied certiorari in *Washington*, the Court did the same regarding the California Supreme Court's decision in *People v. Geier*.<sup>214</sup> *Geier* appears to exemplify a pre-*Melendez-Diaz* court arriving at the right answer for the wrong reasons. The *Geier* court held that the admission of DNA test results through the testimony of an expert who had not performed the tests did not violate the defendant's confrontation rights.<sup>215</sup> In *Geier*, the California Supreme Court announced a rule that a statement is nontestimonial unless it is "(1) made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial."<sup>216</sup> The court decided that the DNA lab results did not fulfill the second requirement because they were based on a "contemporaneous recordation of *observable events*."<sup>217</sup> Accordingly, the court found the analyst was, like a 911 caller reporting an emergency in *Davis*, not "bearing witness."<sup>218</sup> Alternatively, the court found the analyst's notes and report were nontestimonial

because they were made "as part of [the analyst's] job,"<sup>219</sup> and were "neutral,"<sup>220</sup> "routine,"<sup>221</sup> and not made "in order to incriminate [the] defendant."<sup>222</sup>

The Court in *Melendez-Diaz* explicitly rejected both of these lines of reasoning. The *Melendez-Diaz* Court dismissed the dissent's suggestion that the Massachusetts analyst's reports should be considered nontestimonial because they reported "near-contemporaneous observations." First, the Court rejected the dissent's characterization of the reports, noting that the analysts completed the affidavits almost a week after conducting the tests.<sup>223</sup> The Court then explained, citing *Davis*, that the "near-contemporaneous" recording of statements did not in any case render them nontestimonial.<sup>224</sup> Although the *Geier* court characterized the reports in that case as being "contemporaneous recordation of observable events,"<sup>225</sup> it seems very unlikely that the analysis actually occurred contemporaneously with the analyst's observation of the tests. After all, the term "analysis" implies at least some degree of thoughtful reflection. Reflection, by definition, requires time. Most significantly, the *Melendez-Diaz* Court rejected outright the contention, advanced by the *Melendez-Diaz* dissent and the *Geier* court, that a statement from a witness who does not "recall[] events observed in the past"<sup>226</sup> or observe "the crime [or] any human action related to it"<sup>227</sup> is exempted from Confrontation Clause scrutiny.<sup>228</sup>

The *Melendez-Diaz* Court also rejected the idea advanced by the *Geier* court that the results of forensic testing are nontestimonial because they are the result of neutral, scientific procedures. The Court explained that the Sixth Amendment's procedural guarantee of cross-examination could not be avoided on the grounds that testimony reporting the results of forensic tests is more reliable than ordinary testimony.<sup>229</sup> To argue otherwise, the Court reasoned, would simply invite a return to the rationale of *Ohio v. Roberts*, which the Court overturned in *Crawford*.<sup>230</sup> Finally, the Court noted that "neutral scientific

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 230.

<sup>212</sup> *Id.* at 231.

<sup>213</sup> *Id.*

<sup>214</sup> 41 Cal. 4th 555 (2007).

<sup>215</sup> *People v. Barba*, 2007 WL 4125230, at \*7 (Cal. Ct App. 2007) (citing *Geier*, 41 Cal. 4th at 605–08).

<sup>216</sup> *Geier*, 41 Cal. 4th at 605.

<sup>217</sup> *Barba*, 2007 WL 4125230, at \*7 (quoting *Geier*, 41 Cal. 4th at 605–06) (italics in original).

<sup>218</sup> *Geier*, 41 Cal. 4th at 607.

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2535 (2009).

<sup>224</sup> *Id.*

<sup>225</sup> *Geier*, 41 Cal. 4th at 607.

<sup>226</sup> *Melendez-Diaz*, 129 S. Ct. at 2535 (internal quotations omitted).

<sup>227</sup> *Id.* (internal quotations omitted).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 2536.

<sup>230</sup> *Id.*

testing” was not necessarily reliable or “immune from the risk of manipulation.”<sup>231</sup>

Why then, given the *Melendez-Diaz* Court’s evisceration of the logical foundation of the *Geier* decision, did the Supreme Court permit *Geier* to remain undisturbed? It may be that the trial court in *Geier* had the right answer when it found that, even if the analyst’s results were inadmissible, the testifying expert could rely on them “for purposes of formulating her opinion as a DNA expert.”<sup>232</sup> It is worth noting that the expert did not simply testify about the end result of the testing. She also testified about the procedures used to ensure an accurate result and testified that, in her opinion, the testing in *Geier*’s case was accomplished according to these procedures.<sup>233</sup> The expert relied on records generated by other people in reaching this conclusion.<sup>234</sup>

The fact that the Supreme Court permitted *Washington* and *Geier* to remain undisturbed strongly indicates that the Court is satisfied that the presentation of evidence in those cases did not violate the Confrontation Clause. If that is so, it follows that a majority of the Court believes the Confrontation Clause is satisfied when an expert testifies about her own independent conclusions, even if her conclusions are based on otherwise inadmissible testimonial evidence.<sup>235</sup>

Several courts since *Melendez-Diaz* was decided have reached that conclusion. The court in *People v. Rutterschmidt*<sup>236</sup> held that an expert’s testimony about forensic blood test results was nontestimonial where the expert supervised, but did not perform, the underlying tests. The *Rutterschmidt* court, citing *Geier*, reasoned that the defendant’s confrontation rights were not violated because the “accusatory opinions . . . were reached and conveyed not through the nontestifying technician’s laboratory notes and report, but by the testifying witness.”<sup>237</sup> The court distinguished *Melendez-Diaz* on the grounds that live testimony, not an affidavit, was admitted to prove the lab test results.<sup>238</sup> The court held that this basis alone was sufficient to distinguish *Melendez-Diaz* because “the lead opinion [in *Melendez-Diaz*] speaks for a court majority only on the narrow basis set forth in Justice Thomas’s concurring

opinion.”<sup>239</sup> A number of other courts since *Melendez-Diaz* have reached the same conclusion as the *Rutterschmidt* court.<sup>240</sup>

A note of caution: Prosecutors and labs may be tempted to assign a single lab employee the task of certifying test results and testifying in court about the results. Although this would certainly reduce the burden on the Government, it seems unlikely to pass muster under the Supreme Court’s confrontation jurisprudence unless the certifying employee reviews the entire process, draws his or her own independent conclusions, and testifies only about those conclusions. As the *Melendez-Diaz* dissent points out, the Court in *Davis v. Washington* rejected any attempt to evade the Confrontation Clause “by having a note-taking policeman [here, the laboratory employee who signs the certificate] recite the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition.”<sup>241</sup> Permitting a certifying official to merely restate testimonial statements of a nontestifying analyst would seem to defy the logic of *Crawford* and its progeny.

In sum, barring presentation of testimony by the actual analyst, the Government should call an expert to testify to forensic test results at trial. That expert should thoroughly understand the procedures and protocols involved in the forensic test at issue; should have supervised or performed the test of the material or sample at issue; should have reviewed all of the information about the performed test; and should have drawn independent conclusions about the results of the test, compliance with applicable procedures, and the reliability of the science behind the test. In contrast, the defense should seek to limit the scope of an expert witness’s

<sup>231</sup> *Id.*

<sup>232</sup> 41 Cal. 4th 555, 596 (2007).

<sup>233</sup> *Id.* at 594–96.

<sup>234</sup> *Id.*

<sup>235</sup> Military Rule of Evidence 703 and its federal counterpart permits expert witnesses to base their opinions and inferences on facts or data that are themselves inadmissible.

<sup>236</sup> 176 Cal. App. 4th 1047 (2d Dist. 2009).

<sup>237</sup> *People v. Rutterschmidt*, 176 Cal. App. 4th 1047, 1074 (Cal. Ct. App. 2009) (citing *Geier*, 41 Cal. 4th at 607) (internal quotations omitted).

<sup>238</sup> *Id.* at 1075.

<sup>239</sup> *Id.* See also *Larkin v. Yates*, 2009 WL 2049991, at \*2 (Cal. 2009) (finding “no clear majority if . . . the offending material did not consist of formalized testimonial material”); *People v. Johnson*, 2009 WL 2999142, at \*8 (Ill. App. 1st Dist.) (noting Justice Thomas’s concurrence and holding that “*Melendez-Diaz* did not reach the question of whether the analyst who conducted the scientific tests must testify at a defendant’s trial”).

<sup>240</sup> See, e.g., *Rector v. State*, 285 Ga. 714 (Ga. Sp. Ct. 2009) (expert testimony by a toxicologist who reviewed another toxicologist’s report and agreed with it did not violate the Confrontation Clause); *Larkin v. Yates*, 2009 WL 204991 (C.D. Cal.) (a lab supervisor testifying about the results of DNA testing that she reviewed but did not personally perform did not violate the defendant’s confrontation rights); *People v. Johnson*, 2009 WL 2999142 (Ill. App. 1st Dist.) (expert testimony by a forensic scientist about DNA analyses she did not perform did not violate defendant’s confrontation rights); *People v. Milner*, 2009 WL 2025944 (Cal. App. 2d Dist.) (expert testimony regarding cause of death by a medical examiner who relied on another examiner’s autopsy as the basis for his opinion did not form the basis for an ineffective assistance of counsel claim under the Confrontation Clause); *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010) (expert testimony about results of lab tests by chemist who peer-reviewed but did not perform the test and formed independent conclusions based on the actual analyst’s notes and data charts did not violate the Confrontation Clause).

<sup>241</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2546 (2009)(Kennedy, J. dissenting) (quoting *Davis v. Washington*, 547 U.S. 813, 826 (2006)) (internal quotations omitted).

recognized areas of expertise, thus forcing the Government to call additional witnesses. Even if a witness is clearly an expert on certain scientific procedure, defense counsel should challenge the expert's knowledge regarding the chain of custody, preparation of samples for testing, authenticity of samples, and any other facts the Government might want to prove using their expert. This is crucial because, as is discussed in Part IV.D, below, *Melendez-Diaz* may restrict the Government's ability to introduce chain of custody or equipment maintenance evidence without live witnesses.

### C. Can the Lab Report Be Admitted Without Accompanying Testimony by the Analyst Who Prepared It?

Besides finding that expert testimony based on an underlying report is nontestimonial, the cases discussed in the previous section have something else in common. The underlying report in those cases was not itself admitted into evidence. Although at least one court since the *Melendez-Diaz* decision has permitted the admission of a certificate of analysis without the live testimony of the analyst who performed the analysis,<sup>242</sup> this practice seems to run afoul of *Melendez-Diaz*.

The prosecution in *Pendergrass v. State*<sup>243</sup> offered a DNA certificate of analysis and two supporting documents along with the live testimony of two witnesses: a lab supervisor who checked the work of a lab "processor" who performed the test and an expert who interpreted the test results for the jury.<sup>244</sup> The Supreme Court of Indiana held that the admission of the certificate did not violate the Confrontation Clause.<sup>245</sup> The court explained that, unlike the defendant in *Melendez-Diaz* who "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed,"<sup>246</sup> the defense in *Pendergrass* was "thoroughly prepared" to address these issues because the prosecution's witnesses had testified about these matters before the prosecution sought to admit the certificate.<sup>247</sup>

<sup>242</sup> *Pendergrass v. State*, 913 N.E. 2d 703 (Ind. 2009).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 707–08.

<sup>245</sup> *Id.* at 708.

<sup>246</sup> *Id.* (citing *Melendez-Diaz*, 129 S. Ct. at 2537) (internal quotations omitted).

<sup>247</sup> *Id.* Cf. *People v. Benjamin*, 2009 WL 2933153 (Cal. App. 2d Dist.) (admission of reports prepared by non-testifying analysts did not infringe on defendant's confrontation rights because an expert testified about the reports and the defendant did not object to their admission at trial); *United States v. Darden*, 2009 WL 3049886 (D. Md.) (admission of the written report of a testifying toxicologist based on the results of a forensic blood analysis performed by two non-testifying lab technicians that the toxicologist supervised does not violate defendant's confrontation rights where the testifying toxicologist formed his own conclusions based on machine-generated data).

The *Pendergrass* court's approach seems less likely to survive future scrutiny. The admitted documents contained statements made by a witness the defendant was unable to cross-examine. To suggest the defendant's ability to cross-examine the testifying witnesses about the statements in the documents was an adequate substitute is nonsensical because the Confrontation Clause protects the defendant's right to cross-examine the witness who actually made the statements. It is a fundamentally different proposition to allow a witness to present expert testimony based on statements contained in non-admitted documents. In that case, the statements in the documents, although testimonial, are not admitted into evidence for the truth of the matter asserted.<sup>248</sup> The Supreme Court in *Crawford* indicated that this use would not violate the Sixth Amendment because "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."<sup>249</sup>

### D. What Is the Effect of *Melendez-Diaz* on Chain of Custody and Equipment Maintenance Evidence?

Among the other changes wrought by *Melendez-Diaz*, the decision also restricts a prosecutor's ability to introduce documents proving the chain of custody or the maintenance and calibration of devices used for forensic tests. Regarding chain of custody evidence, the *Melendez-Diaz* Court explained in footnote 1 that it did not hold "that anyone whose testimony may be relevant in establishing the chain of custody . . . must appear in person."<sup>250</sup> The Court reasoned that "gaps in the chain of custody go to weight, not admissibility" and left it to prosecutors "to decide what steps in the chain of custody are so crucial as to require evidence."<sup>251</sup> However, the Court also held that "what [chain of custody] testimony is introduced must (if the defendant objects) be introduced live."<sup>252</sup>

Gone, apparently, are the days when the Government could introduce without defense challenge "a chain of custody document listing specific dates and all law enforcement personnel who handled the marijuana," as it did in *Williamson*.<sup>253</sup> To the extent the Government believes a link in a chain of custody is vulnerable to attack, it will need

<sup>248</sup> See *People v. Rutterschmidt*, 176 Cal. App. 4th 1047, 1076 (Cal. Ct. App. 2009).

<sup>249</sup> *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

<sup>250</sup> *Id.* at 42 n.1.

<sup>251</sup> *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.

<sup>252</sup> *Id.*

<sup>253</sup> *United States v. Williamson*, 65 M.J. 706, 710 (A. Ct. Crim. App. 2007). Although the defense in *Williamson* did not object to the chain of custody document's admission, it is unlikely that a defense counsel who is aware of *Melendez-Diaz* will do so without obtaining a *quid pro quo* from the Government.

to present a live chain of custody witness to prove that link directly.<sup>254</sup>

As an alternative to direct evidence of the chain of custody, *Melendez-Diaz* does appear to permit expert evidence generally proving that a lab followed procedures in performing a forensic test. As discussed in Part IV.B, above, an expert could use inadmissible material, including chain of custody documents, as part of a basis for her opinion that a lab followed certain protocols described by the expert.

The *Melendez-Diaz* Court also raised the bar for the admission of evidence supporting the maintenance and calibration of devices used in forensic testing, although to a lesser degree than it did for chain of custody evidence. As with chain of custody evidence, the Court stated in footnote 1, “[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device must appear in person.”<sup>255</sup> Unlike chain of custody evidence, however, the Court held that certain equipment maintenance documents might qualify as nontestimonial business records.<sup>256</sup> Although prosecutors may be able to admit evidence of equipment calibration and maintenance using records, they now have to take the additional step of proving that such records are nontestimonial. Various courts have already begun wrestling with this issue.

The court in *United States v. Griffin*,<sup>257</sup> a federal DUI prosecution occurring in Virginia, cited footnote 1 when it held that a “Certificate of Instrument Accuracy” for a breath alcohol measuring device was nontestimonial evidence.<sup>258</sup> The *Griffin* court explained that the certificate was nontestimonial because it “was not prepared with knowledge of any particular defendant’s case, or specifically for use in any particular trial.”<sup>259</sup> The court noted that, under the applicable Virginia law, technicians were required to ensure the device’s accuracy semiannually, “regardless of whether [it] will be used to procure breath test results for DUI cases.”<sup>260</sup> Accordingly, the court found the “‘primary purpose’ of calibration certificates . . . is not ‘to establish or

prove past events potentially relevant to later criminal prosecution.”<sup>261</sup>

The Court of Appeals of Oregon in *State v. Bergin* similarly held that certificates attesting to the accuracy of an “intoxilyzer” breath alcohol device were nontestimonial.<sup>262</sup> The *Bergin* court distinguished the drug certificates at issue in *Melendez-Diaz* from the intoxilyzer certificates of accuracy in three ways. First, the court noted that unlike the drug certificates that the *Melendez-Diaz* Court found were “quite plainly affidavits,” the intoxilyzer certificates were not sworn under oath.<sup>263</sup> Second, the court reasoned that while the drug certificates directly proved a fact that was an element of a charged offense, the intoxilyzer certificates bore “a more attenuated relationship to the conviction: they [supported] one fact (the accuracy of the machine) that, in turn, [supported] another fact that can establish guilt (blood alcohol level).”<sup>264</sup> Third, the *Bergin* court examined the subjective knowledge of the person preparing the certificate. The court noted that the analysts in *Melendez-Diaz* knew the certificates they were preparing were for use at trial against a specific defendant, while the person performing the intoxilyzer accuracy tests had “no particular prosecutorial use in mind, and, indeed, . . . no guarantee that the [intoxilyzer] will ever, in fact, be used.”<sup>265</sup> Citing footnote 1, the court concluded that “*Melendez-Diaz* either rejects, or at least leaves open, the question of whether Intoxilyzer certificates . . . are testimonial.”<sup>266</sup>

The *Melendez-Diaz* Court’s discussion of the relationship between the Confrontation Clause and business-and-public-records is likely the key to this question:

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial.<sup>267</sup>

The bottom line is that the Government must show that equipment maintenance records are maintained for some purpose other than “establishing or proving some fact at trial” in order to have them admitted as nontestimonial business records. In the alternative, the Government could

<sup>254</sup> *But see* *United States v. Bradford*, 2009 WL 4250093 (A.F. Ct. Crim. App. Nov. 23, 2009) (holding that “chain of custody lab technicians make no statements which would fall within the Confrontation Clause and the holding of *Melendez-Diaz*” because their “notations and signatures are not testimony”).

<sup>255</sup> *Melendez-Diaz*, 129 S.Ct. at 2532 n.1.

<sup>256</sup> *Id.*

<sup>257</sup> 2009 WL 3064757 (E.D. Va).

<sup>258</sup> *United States v. Griffin*, 2009 WL 3064757, at \*2 (E.D. Va).

<sup>259</sup> *Id.* See also *United States v. Washington*, 498 F.3d 225, 232 (4th Cir. 2007) (holding that a blood-testing device could “tell no difference between blood analyzed for health-care purposes and blood analyzed for law enforcement purposes”).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

<sup>262</sup> 2009 WL 3018038 (Or. Ct. App. 2009).

<sup>263</sup> *Id.* at \*3.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at \*4.

<sup>267</sup> *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2539–40 (2009).

argue that Justice Thomas's concurrence means that *Melendez-Diaz* does not reach a given record because the record is not formalized testimonial material. It is not clear from Justice Thomas's opinions since *Crawford*, however, exactly what the Government must show in order to prove that proposition.

## V. Conclusion

The Danish physicist Niels Bohr is purported to have said "prediction is very difficult, especially if it's about the future."<sup>268</sup> This sentiment certainly holds true in the universe of Confrontation Clause jurisprudence. While the *Melendez-Diaz* decision clarified the reach of the *Crawford* line of cases, the decision also disrupted long-standing prosecutorial practices regarding the results of forensic tests.

Although there is significant uncertainty about how evidence of forensic tests may be admitted at trial, it seems apparent that government trial counsel may no longer offer reports of urinalyses generated as a result of individualized suspicion as nontestimonial business records. The same may also hold true for random urinalyses as well. However, it is likely that prosecutors will be permitted to introduce the evidence through experts who did not personally perform the test. If this prediction is accurate, the impact of *Melendez-Diaz* on the Government, although still significant, will be greatly reduced.

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<sup>268</sup> Niels Bohr Quotes, [http://thinkexist.com/quotes/niels\\_bohr/3.html](http://thinkexist.com/quotes/niels_bohr/3.html) (last visited Nov. 16, 2009).